Supreme Court, U.S.
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No. 98-___

In The

Supreme Court of the United States

October Term, 1997

American Dental Association,

Cross-Petitioner,

v.

Carole Kolstad,

Cross-Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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August 28, 1998

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34 pp

QUESTION PRESENTED

Whether evidence that an employer's articulated reason for an employment decision was pretextual, along with the elements of a *prima facie* case, *always* permits an inference that the articulated reason was a pretext for discrimination, under *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioner American Dental Association respectfully requests that if the Court grants the petitioner's Petition for a Writ of *Certiorari*, it also grant this Conditional Cross-Petition to review the question presented herein.

OPINIONS BELOW

The district court's decision denying the cross-petitioner's motion to set aside the jury verdict is set forth in petitioner's appendix at 69a-74a. 912 F. Supp. 13 (D.D.C. 1996). The panel decision of the court of appeals is set forth in petitioner's appendix at 42a-74a. 108 F.3d 1341 (D.C. Cir. 1997). The orders of the court of appeals denying rehearing and granting rehearing *en banc* limited to the issue of punitive damages are set forth in petitioner's appendix at 75a-77a. The *en banc* decision of the court of appeals on the issue of punitive damages is set forth in petitioner's appendix at 1a-41a. 139 F.3d 958 (D.C. Cir. 1998).

JURISDICTION

The court of appeals panel decision was entered March 21, 1997. The *en banc* decision on punitive damages was entered May 8, 1998. Petitioner's Petition for a Writ of *Certiorari* seeking review of the punitive damages decision was docketed on July 31, 1998. This Conditional Cross-Petition is filed pursuant to Rule 12.5 of the Rules

of the Supreme Court. Statutory jurisdiction over this petition is conferred by 28 U.S.C. § 1254.

STATUTE INVOLVED

The pertinent provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* are set forth in cross-petitioner's appendix at 1a.

STATEMENT OF THE CASE

In *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), the Court held that evidence of pretext permits, but does not compel, a finding of intentional discrimination. The Courts of Appeals are deeply divided on the follow-up question: whether evidence of pretext *always* permits a finding of discrimination. The answer governs the ability of trial courts to grant summary judgment or judgment as a matter of law when the plaintiff has introduced evidence of pretext, but that evidence is not reasonably suggestive of discrimination.

1. The district court failed to set aside the verdict even though the court saw no evidence reasonably suggestive of discrimination.

The petitioner (plaintiff)[1] filed a Title VII claim in the United States District Court for the District of Columbia,

[1] For ease of reference, cross-respondent/petitioner Kolstad is referred to as the plaintiff. Cross-petitioner/respondent American Dental Association, the employer, is referred to as the ADA.

alleging that she was denied a promotion because of her gender. She relied primarily on evidence that a male employee had been "pre-selected" for the job in question. After the close of evidence, but before the jury was instructed, the district court dismissed plaintiff's claim for punitive damages. The jury found the ADA liable.

The ADA filed a post-trial motion to set aside the jury verdict, pursuant to Fed. R. Civ. P. 50(c). The district court issued a decision finding that "no direct evidence of sex-based motivation on the part of" the ADA was presented. To the contrary, the district court observed that with the exception of the plaintiff, each witness, male and female alike, testified that the male candidate was better qualified than plaintiff. (Pet. App. 71a).

The district court further found that the only circumstantial evidence favorable to the plaintiff was that the male had been "pre-selected" for the job. (Pet. App. 71a). There was nothing about the pre-selection, however, that was suggestive of gender-based discrimination. "What was missing, for present purposes, is evidence even suggestive of, let alone demonstrating, a gender-related factor in the preference exhibited by everyone for Spangler," the district court found. (Pet. App. 71a).

Despite the lack of any direct or circumstantial evidence suggestive of discrimination, the district court found it was compelled by circuit precedent to allow the jury verdict to stand. Citing *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted in part*, 116 S. Ct. 805, *dismissed after settlement*, 116 S. Ct. 1037 (1996), the district court held that juries "may infer unlawful discrimination

solely from a rejection of a defendant-employer's professedly innocent explanation as 'pretext' " (Pet. App. 73a). The district court made it explicit that its refusal to set aside the jury verdict was based solely on *Barbour*. "Were it open to this Court to set aside the verdict under Fed. R. Civ. P. 50(c), however, this Court would do so." (Pet. App. 74a).

2. The court of appeals panel affirmed based on *Barbour v. Merrill*.

The court of appeals panel affirmed the district court's failure to set aside the jury verdict. The panel held that the jury could have found discrimination based on a two-stage inference. First, the panel found that evidence that the ADA engaged in pre-selection is " 'undeniably relevant to the question of discriminatory intent,' *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), and 'operates to discredit the employer's proffered explanation for its employment decision.' *Goostree v. State of Tenn.*, 796 F.2d 854, 861 (6th Cir. 1986), [*cert. denied*, 480 U.S. 918]." (Pet. App. 47a). Second, citing its decision in *Barbour*, the panel found that evidence of pretext is enough to allow the jury reasonably to infer intentional sex discrimination. (Pet. App. 48a).[2]

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[2] The court of appeals panel buttressed this holding by referencing evidence that an ADA official referred to two women (not plaintiff, or women in general, or even any woman in the office in which plaintiff worked) as a "bitch" or "battleaxe" and told offensive jokes at a staff meeting (the particulars of which the plaintiff, the only witness who testified concerning them, could not remember). The court of appeals *en*

The court of appeals panel also reversed the district court's ruling dismissing plaintiff's claim for punitive damages. The panel ruled that evidence sufficient to prove intentional discrimination is also sufficient to allow the jury to decide punitive damages. (Pet. App. 49a-53a).

3. The court of appeals *en banc* repudiated the evidence relied on by the jury and panel.

The ADA's suggestion for rehearing *en banc* was granted, but limited to the issue of punitive damages. (Pet. App. 75a-76a). The *en banc* decision of the court of appeals affirmed the district court's dismissal of the punitive damages claim. (Pet. App. 22a). The *en banc* decision held that in order to recover punitive damages, there must be a showing of egregious conduct. (Pet. App. 2a). It found no such evidence in this case. (Pet. App. 20a).

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banc majority observed that the person who allegedly told the jokes was not the decision-maker and that such evidence has little probative value. (Pet. App. 22a). *Accord Galloway v. General Motors Serv. Parts Operation*, 78 F.3d 1164, 1168 (7th Cir. 1996) (Posner, J) (observing that use of term "bitch" to refer to plaintiff did not create inference of gender discrimination because "[i]n its normal usage it is simply a pejorative for 'woman' "); *Kriss v. Sprint Communications Co., Ltd.*, 58 F.3d 1276, 1281 (8th Cir. 1996) (evidence that male manager called a woman "bitch" and referred to another as "ugly" was "not particularly probative of whether someone would refuse to promote someone else for improper reasons"). *See also, Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring) (stray comments not probative of discrimination).

Indeed, the court of appeals *en banc* majority questioned whether the evidence in this case would even be sufficient to prove liability.

> As the district court noted, 912 F. Supp. at 14-15, the jury's finding of discrimination appears to have been premised largely if not exclusively upon its apparent rejection, as mere pretext, of ADA's proffered rationales – that Kolstad's legislative experience and writing skills were inadequate. Whether such a rejection, by itself, is enough to support an award of *compensatory* damages is a question for a different *en banc* proceeding, see *Aka v. Washington Hospital Center*, 116 F.3d 876 (D.C. Cir. 1997), vacated pending rehearing *en banc*, 124 F.3d 1302 (D.C. Cir. 1997), but in this case, it falls far short of supplying grounds for a punitive award.

(Pet. App. 20-21a, footnote omitted).

The court of appeals *en banc* majority also found, contrary to the panel, that while evidence of pre-selection might permit an inference that the employer's proffered reasons for an employment decision were pretextual, like any other evidence of pretext, "pre-selection is relevant only insofar as it logically supports an inference of discriminatory intent, i.e., trivially at best." (Pet. App. 47a).

The net result is that the ADA has been held liable for discrimination based on circumstantial evidence that the trial court discredited as not suggestive of discrimination and that the court of appeals *en banc* discounted as trivial at best. Nevertheless, the trial court was deprived of its ability to set aside the verdict, based on the panel's adherence to *Barbour's* holding that evidence of pretext is

always sufficient to sustain a finding of intentional discrimination.

REASONS FOR GRANTING THE WRIT

Because discrimination is typically proved through circumstantial evidence, it is impossible to discuss what evidence is sufficient to justify awarding punitive damages without, at the same time, considering how intentional discrimination is proved in the first place, including the respective roles of the judge and jury. The latter issue, one of utmost importance, has generated a deep split among the circuits. "The entire area of shifting burdens is replete with confusion, and guidance is needed desperately." *Developments in the Law – Employment Discrimination*, 109 HARV. L. REV. 1579, 1602 (May 1996).

A. THERE IS A SPLIT AMONG THE CIRCUITS.

In *St. Mary's Honor Center v. Hicks*, *supra*, the Court held that evidence of pretext does not compel, but does permit, a finding of discrimination. Since then, there has been confusion and disagreement over whether evidence of pretext *always* permits a finding of discrimination, or whether trial courts can dismiss cases in which there is evidence of pretext, but that evidence does not, under the circumstances, raise a reasonable inference of discrimination. "The circuits have not come to agreement on this issue, and the Supreme Court will inevitably need to

resolve it." Deborah C. Malamud, *The Last Minuet: Disparate Treatment after* Hicks, 93 MICH. L. REV. 2229, 2397 (1995).

The Courts of Appeals for six circuits, the Third (*en banc*), Sixth, Seventh, Ninth, Tenth (*en banc*), and District of Columbia, hold that evidence of pretext is always sufficient to permit the trier of fact to find discrimination. The trial court does not have authority to grant summary judgment or judgment as a matter of law if there is evidence of pretext. *Kolstad v. American Dental Ass'n*, Pet. App. 42a-74a; *Aka v. Washington Hospital Center*, 116 F.3d 876, 881-82 (D.C. Cir. 1997) (summary judgment), *vacated pending rehearing en banc*, 124 F.3d 1302 (D.C. Cir. 1997); *Barbour v. Merrill, supra* (judgment as a matter of law (JAML)); *Sheridan v. E.I. DuPont de Nemours and Co.*, 100 F.3d 1061, 1066-72 (3d Cir. 1996) (*en banc*) (JAML), *cert. denied*, 117 S. Ct. 2532 (1997)[3]; *Kline v. Tennessee Valley*

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[3] The dissent in *Sheridan v. E.I. DuPont de Nemours* provides a good capsule summary of the opposing view, correctly analyzing the issue not as whether "pretext plus" is required, but as whether pretext always raises an inference of discrimination.

> In my view, the correct test is the following: a defense motion for summary judgment or judgment as a matter of law should be granted when the evidence in the record could not persuade a rational trier of fact that intentional discrimination on the ground alleged by the plaintiff was a determinative cause of the challenged employment action. This does not mean that a plaintiff, in order to reach the trier of fact, must always prove "pretext plus," i.e., that the plaintiff must always produce some evidence in addition to what is necessary to establish a prima facie case and to show that the employer's explanation is pretextual.

Authority, 128 F.3d 337, 343-47 (6th Cir. 1997) (bench trial); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120, 1123-24 (7th Cir. 1994) (summary judgment); *Godwin v. Hunt Wesson, Inc.*, ___ F.3d ___, 1998 U.S. App. Lexis 18380 (9th Cir. Aug. 11, 1998) (summary judgment); *Washington v. Garrett*, 10 F.3d 1421, 1432-33 (9th Cir. 1993) (summary judgment); *Randle v. City of Aurora*, 69 F.3d 441, 451-53 (10th Cir. 1995) (*en banc*) (summary judgment).[4]

Five circuits, the First, Second (*en banc*), Fourth, Fifth (*en banc*), and Eighth (*en banc*), hold that "a finding of pretext, together with the evidence comprising a prima facie case, is not always sufficient to sustain an ultimate finding of intentional discrimination." *Fisher v. Vassar College*, 114 F.3d 1332, 1338 (2d Cir. 1997) (*en banc*) (bench trial), *cert. denied*, 118 S. Ct. 851 (1998). In these circuits, the trial court may grant summary judgment or judgment as a matter of law, even if there is evidence of pretext, if that evidence does not raise a reasonable inference of discrimination under the circumstances. *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 16 (1st Cir. 1994) (summary judgment), *cert. denied*, 514 U.S. 1108 (1995); *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 260-61 n.3 (1st Cir. 1994); *Grady v. Affiliated Central, Inc.*, 130 F.3d 553, 559-60 (2d Cir. 1997) (summary judgment); *Fisher v. Vassar College, supra* (bench trial) (*en banc*); *Gillins v. Berkeley Coop.*,

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> On the contrary, in most cases, such additional proof is not needed. But I disagree with the majority that proof of the elements of the prima facie case and proof of pretext are *always* enough.

100 F.3d 1078-89 (Alito, J. dissenting, footnote omitted).

[4] The panel decision in *Randle* was adopted *en banc* in a footnote. 69 F.3d at 452, n.17.

Inc., ___ F.3d ___, 1998 U.S. App. Lexis 15264 (4th Cir. July 9, 1998) (summary judgment); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 201-02 (4th Cir. 1997) (summary judgment); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 993-94 (5th Cir. 1996) (*en banc*) (bench trial); *Ryther v. KARE 11*, 108 F.3d 832, 836-38 (8th Cir.) (*en banc*) (JAML), *cert. denied*, 117 S. Ct. 2510 (1997).[5]

B. THE DECISION BELOW CONFLICTS WITH SUPREME COURT PRECEDENT.

Under the *McDonnell Douglas* scheme, a plaintiff has the minimal burden of making a prima facie case of discrimination.[6] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 792 (1981); *St. Mary's Honor Center v.*

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[5] There is an intracircuit split in the Eleventh Circuit. Compare *Combs v. Plantation Planters*, 106 F.3d 1519, 1529-36 (11th Cir. 1997) (finding pretext always sufficient), *cert. denied*, 118 S. Ct. 685 (1998), and *Evans v. McClain of Georgia*, 131 F.3d 957, 963 (11th Cir. 1997) (following *Combs*) with *Walker v. Nationsbank of Florida*, 53 F.3d 1548, 1557 (11th Cir. 1995) (pretext not always sufficient) and *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 441-43 (11th Cir. 1996) (same), *cert. denied*, 117 S. Ct. 2511 (1997).

[6] The *McDonnell Douglas* scheme has exempted discrimination cases from the usual rule that a prima facie case must consist of evidence which ultimately would be sufficient to support a jury verdict. *Fisher v. Vassar College*, *supra*, 114 F.3d at 1336. At this stage, "a plaintiff alleging discrimination can satisfy the prima facie case and avoid dismissal at the conclusion of the plaintiff's direct case *without* submitting evidence sufficient to support a finding in his favor on each element that the plaintiff must ultimately prove to win." *Id.* at 1337 (emphasis in original).

Hicks, supra, 509 U.S. at 506. If the plaintiff makes this minimal showing, the employer must articulate (not prove) a non-discriminatory reason for its decision. *Id.* at 506-07. At that point, the prima facie case – the only real significance of which is to require the employer to come forth with an explanation – "drops from the case." *Id.* at 507. The plaintiff must meet the " 'ultimate burden of persuading the [trier of fact] that [he] has been the victim of intentional discrimination.' " *Id.* at 508 (brackets in original), *quoting Burdine,* 450 U.S. at 256.

In *Hicks,* the Court held that evidence of pretext does not compel, but permits, a finding of discrimination. It stressed that discrimination, not pretext, is the ultimate issue. "But a reason cannot be proved to be a 'pretext for *discrimination*' unless it is shown *both* that the reason is false *and* that discrimination was the real reason." *Id.* at 515 (emphasis in original). "Nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable." *Id.* at 514-15.

On the other hand, direct evidence of discrimination is not necessarily required. "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Id.* at 511. The question that has troubled and divided the courts is whether judges have a role in determining the sufficiency of the evidence to show intentional discrimination, or whether that question must always be left to the jury.

Throughout the evolution of the *McDonnell Douglas* burden shifting scheme, the Court has emphasized that it is simply a device to allocate the burden of production. It is supposed to be applied flexibly, and adapted to the facts of each case. *St. Mary's Honor Center v. Hicks, supra,* 509 U.S. at 519. Discrimination should not be treated differently from any other ultimate question of fact. *Id.* at 507, 524.

The fallacy of the decision below arises from the fact that not all evidence challenging an employer's explanation for an employment decision suggests that the real reason is discrimination. Evidence of pretext comes in an infinite variety of circumstances. In some cases, evidence of pretext, coupled with the elements of a prima facie case, may raise a reasonable inference of discrimination.[7]

In other cases, however, "the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff." *Fisher,* 114 F.3d at 1338.

> But the label "pretext" does not answer the question, pretext for what? In some cases, an employer's proffered reason is a mask for unlawful discrimination. But discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small-

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[7] For example, the paradigm case would be that a qualified African-American applies for a job, is falsely told there is no vacancy, and then learns that a white who applied after him was interviewed and hired. In that case, the employer's lie is suggestive of discrimination.

> minded, such as back-scratching, log-rolling, horse-trading, institutional politics, envy, nepotism, spite or personal hostility.

Id. at 1337.

Evidence of pretext is not always generated by an employer's effort to conceal the true reason for its decision. It is easy to inadvertently create evidence that a plaintiff can use to show pretext. For example, when there are multiple decision-makers, there is a strong possibility of inconsistent explanations for employment decisions, not due to discrimination, but due to different people having different perspectives on the decision. *Fisher*, 114 F.3d at 1338.

Sugar-coating an employment decision to protect an employee's feelings can create evidence of pretext. (Pet. at 5-6, n.7; Pet. App. 39a). So can interviewing a candidate who does not meet the specified job qualifications. *Barbour v. Merrill, supra.* An employer that gives charitable performance evaluations and pay raises is exceedingly vulnerable to claims of pretext if it later defends an employment discrimination claim on the grounds that the employee's work was deficient. *Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1195 (5th Cir. 1992). Simply failing to maintain adequate documentation is often treated as evidence of pretext. *Id.* Taking a short-cut to avoid internal selection procedures is often viewed as evidence of pretext. (Pet. App. 47a).

In many cases, the evidence of pretext is nothing more than a difference of opinion over whether the employer made the correct selection decision. "The fact that a court may think that the employer misjudged the

qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer's reasons are pretexts for discrimination." *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259. A plaintiff's disagreement about the importance of job prerequisites, such as previous experience or education, can be treated as evidence of pretext. *Barbour v. Merrill, supra; Aka v. Washington Hospital Center, supra.* So can a plaintiff's disagreement with the employer's assessment of his own qualifications. *Id.* Evidence of pretext can also arise if an employer bases an employment decision on subjective criteria, for example, a candidate's enthusiasm. *Aka v. Washington Hospital Center, supra.*

Given the infinite variety of false statements, conflicting statements, policy deviations, short cuts, failures to document, reliance on subjective criteria, disputes about job prerequisites, disputes about candidates' qualifications, etc., that can be offered to attack an employer's explanation as pretextual, it is simply unrealistic to presume that such evidence *always* raises a reasonable inference of discrimination. The *Barbour* rule relied upon by the panel below nevertheless requires a trial court to submit the question of discrimination to a jury, even when (as the district court found in this case) the evidence of pretext is in no way suggestive of discrimination. In essence, it relieves the plaintiff of the duty to prove that the decision was a "pretext for discrimination" by stripping the trial court of its ability to decide whether it is reasonable for a jury to infer discrimination from the evidence presented. It substitutes an exceedingly general label used to describe a broad category of circumstantial

evidence for reasoned consideration of the adequacy of the circumstantial evidence to prove the ultimate issue in a particular case. It gives controlling effect to the prima facie case, which is supposed to have dropped from the case.

No law or precedent suggests that circumstantial evidence of discrimination is exempt from trial court review of the adequacy of the evidence to prove the ultimate issue. To the contrary, *Hicks* held, "none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." 509 U.S. at 524 (citation and internal quotations omitted).

C. THE ISSUE PRESENTED IS IMPORTANT

Claims of intentional employment discrimination comprise a large and ever growing portion of the federal courts' workload. Almost all such cases are based in large part, if not in whole, on circumstantial evidence governed by the *McDonnell Douglas* burden shifting scheme.

There is no real prospect that the circuit split will cure itself. Five circuits have considered the question *en banc* and reached conflicting results. The Third and Tenth Circuits have adhered *en banc* to the pretext-is-always-sufficient rule, *Sheridan v. E.I. DuPont de Nemours and Co., supra, Randle v. City of Aurora, supra,* while the Second, Fifth, and Eighth Circuits have held that trial courts have authority to review whether evidence of pretext would permit a reasonable inference of discrimination. *Fisher v.*

Vassar College, supra; Rhodes v. Guiberson Oil Tools, supra; Ryther v. KARE 11, supra.[8]

CONCLUSION

For the reasons stated above, if the Court grants plaintiff-petitioner's Petition for Writ of *Certiorari* on the issue of punitive damages, it should also grant this Conditional Cross-Petition, to review the question whether evidence of pretext is always sufficient to support a finding of discrimination.

Respectfully submitted,

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[8] The Court of Appeals for the District of Columbia Circuit has reheard *Aka v. Washington Hospital Center en banc* and it is possible that it will overrule *Barbour*. That possibility should not deter the Court from reviewing the issue presented herein. Even if the Court of Appeals for the District of Columbia reverses itself, there would still be a significant circuit split. A reversal in *Aka* would not make this issue moot, because this case would still be governed by the panel decision.

APPENDIX

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individuals, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if –

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered

under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
>
> (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that any employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws –

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had –

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to

such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to –

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

(2)

No. 98-364

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AMERICAN DENTAL ASSOCIATION,
Cross-Petitioner,

v.

CAROLE KOLSTAD,
Cross-Respondent.

On Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Cross-Respondent Carole Kolstad opposes the Conditional Cross-Petition for a Writ of Certiorari for the reasons set forth herein.

STATEMENT OF THE CASE

Whether there is a split among the Courts of Appeals concerning the application of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), in "pretext only" cases is beside the point, inasmuch as not one judge on the District of Columbia Circuit viewed the record evidence in this case in this manner. The panel found that there was ample evidence of disparate treatment of Kolstad—in addition to evidence of pretext—to support the jury's finding of intentional gender

discrimination. That determination was *not* the subject of the *en banc* proceedings and represents the D.C. Circuit's decision on this issue, as Cross-Petitioner acknowledges. (Cond. Cross-Pet. at 16 & n.8) ("[T]he issue presented . . . [is] governed by the panel decision."). Cross-Petitioner American Dental Association ("ADA") carefully crops from its quotations the evidence recited in the panel opinion which led the court below to uphold *unanimously* the jury's finding of intentional discrimination and to remand Kolstad's claims for equitable relief and attorneys' fees to the district court for reconsideration in accordance with the requirements of the Seventh Amendment. (Pet. App. 55a).

The ADA unsuccessfully sought rehearing on the very ground set forth in the Conditional Cross-Petition. Although a majority of judges of the Court of Appeals voted to rehear the issue of punitive damages, not one judge voted to rehear the case on the grounds that this was a "pretext-only" case or because the panel's decision was inconsistent with this Court's decision in *Hicks* or in conflict with the decisions of other Circuits, as the ADA had argued.[1] Notably, Circuit Judge Williams, who dissented from the denial of rehearing in the case of *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995),[2] for this very reason, *see* 48 F.3d 1281, expressly joined the

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[1] Argument "B" in the ADA's Suggestion For Rehearing *In Banc*, filed on April 18, 1997 in the D.C. Circuit, states as follows:

B. The Panel's Decision on Liability Conflicts With *St. Mary's Honor Center v. Hicks* and With the Decisions of Other Courts of Appeals.

The court below agreed to rehear only the issue of punitive damages. (App. 75a-76a).

[2] This Court granted certiorari in *Barbour* limited solely to the issue of punitive damages, 116 S. Ct. 805, but dismissed the case as moot after a settlement was reached. 116 S.Ct. 1037 (1996).

panel opinion in this case, except for its holding concerning punitive damages. (Pet. App. 57a, 68a) ("I concur in much of the decision, but not in the...standard of evidence for [awards of] punitive damages . . . . I do not dissent from the view that the jury verdict was binding as to liability. . . .").[3]

REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION

Regardless of the asserted conflict among the circuits applying *Hicks*, this is not a case in which the employer's asserted reason for denying the promotion—that Kolstad showed to be false —was the only evidence that was before the jury. The "question" assertedly "presented" by the Conditional Cross-Petition (Cond. Cross-Pet. at i), simply does not exist in this case. The record, as described by the court below, reflects that there was substantial evidence of disparate treatment of Kolstad by the ADA and its decisionmakers—in addition to proof that the ADA's proffered reason for its decision was unworthy of belief.

Secondly, the ADA never preserved this issue for post-verdict and appellate review, in any event. In moving for a directed verdict at the close of all the evidence, the ADA neither cited nor relied upon *Hicks* and made no claim or

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[3] Similarly, Circuit Judge Henderson, who dissented from another panel's application of *Hicks—Aka v. Washington Hospital Center*, 116 F.3d 876, 897, 898-902 (D.C. Cir. 1997)—endorsed the panel opinion in *Kolstad*, finding that the panel "had adequately explain[ed] why a reasonable factfinder could infer discrimination on the basis of the prima facie case and pretext...." *Id.* at 900. The D.C. Circuit, while declining to rehear *this* case on the grounds that the panel had misapplied *Hicks*, agreed subsequently to rehear *Aka en banc* on this very issue, 124 F.3d, 302, as the court below observed (Pet. App. 20a-21a) and, as the ADA concedes. (Cond. Cross-Pet. at 16 & n. 8).

argument that this was a "pretext only" case which did not warrant submission to the jury.

1. THIS CASE DOES NOT PRESENT THE QUESTION CONCERNING THE PROPER INTERPRETATION OF *ST. MARY'S HONOR CENTER v. HICKS*, WHICH HAS DIVIDED THE COURTS OF APPEALS

The ADA agreed to try the issue of liability to the jury and the jury responded with a finding that the ADA had intentionally discriminated against Kolstad because of her sex. When the ADA moved for judgment as a matter of law after the verdict, the district court, while ignoring the ADA's failure to preserve the issue (*see* pp. 7-10, *infra*), nevertheless refused to set aside the verdict. (Pet. App. 69a-74a).

Viewing the evidence in the light most favorable to the prevailing party (which the district court had failed to do), the court below unanimously recognized that Kolstad had offered several types of evidence to support the jury's verdict, in addition to showing that the ADA's proffered reasons for her rejection were unworthy of belief. Thus, the court below found that Kolstad showed that the discrimination at issue was not the isolated spontaneous act of a lower level supervisor, but the result of a three month scheme involving the ADA's national Executive Director and other high-level executives. As part of that scheme, the ADA's officials (a) repeatedly met with the successful male candidate about the promotion, while

refusing to meet with Kolstad,[4] (b) accorded only the male candidate a formal interview by the ADA's Executive Director,[5] and (c) made a last minute change in the job description of the position at issue so that it would conform to the male candidate's background.[6] Second, Kolstad produced evidence showing that the explanation which the ADA offered at trial for selecting the male candidate was entirely different from the explanation which it had given at the time of the

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[4] "Before ADA posted the opening, [the male candidate] Spangler frequently met with the incumbent (Jack O'Donnell), ADA did not post the position promptly after O'Donnell decided to retire, and a secretary familiar with the process testified that she thought Spangler was being groomed for the job. Leonard Wheat, head of ADA's Washington office and the person most closely supervising the competing candidates, refused to meet with Kolstad to discuss O'Donnell's position, despite frequently meeting with Spangler." (Pet. App. 38a).

[5] "Although Executive Director Dr. William Allen formally appointed O'Donnell's successor, Allen—based in ADA's Chicago headquarters—relied heavily upon Wheat's recommendation of Spangler. Assigning all legislative work to Spangler, Wheat repeatedly refused Kolstad's requests to work on legislative matters, despite their relevance to the regulatory issues when covered and her experience in the field. Formally interviewing Spangler but not Kolstad, Allen failed to review Kolstad's numerous, detailed, positive performance evaluations." (Pet. App. 38a).

[6] "[A] few days before posting the job, [the ADA's Executive Director] edited the description to fit [the male's] qualifications. [The incumbent's] position description originally stated that its 'most important responsibility' was to '[m]aintain liaison with federal agencies, bureaus and Administration,' corresponding directly to Kolstad's work at ADA. Tailoring the job description to [the male's] specialty, [the selecting official] added . . . whole phrases from the position description questionnaire used to hire [the male]." (Pet. App. 38a-39a).

selection.[7] Third, Kolstad's evidence showed that the ADA had altered documents to justify its selection of the male candidate.[8] (Pet. App. 39a). Fourth, Kolstad offered evidence that the director of the ADA's Washington office, whose recommendation of the male candidate was accepted by the national headquarters, had repeatedly told sexually offensive jokes at staff meetings and had referred to several prominent professional women in gender-specific derogatory terms.[9] Lastly, Kolstad offered evidence that the reasons given to her by the ADA for denying the promotion were false and pretextual.[10]

The ADA has pointed to no asserted misstatement of the law by the court below on this point. Its quarrel is not with any legal principle articulated by the District of Columbia

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[7] "After telling [Kolstad] that she was passed over because she lacked experience with health care reform and was too valuable in her position, ADA abandoned that justification at trial, instead attacking Kolstad's general qualifications and writing ability." (Pet. App. 39a).

[8] "[T]he jury could have concluded that ADA attempted to cover up [the male's] preselection" by "edit[ing]" the position description, by "[t]ailoring" it to fit the male's "specialty" and that ADA had "altered documents to justify his promotion." (Pet. App. 38a-39a). Based on the trial record, the jury could have found that "Kolstad was the more qualified of the two candidates," that the less experienced "male candidate" "technically failed to meet the minimum posted requirements for the position." (Pet. App. 37a-38a).

[9] "Kolstad's supervisor whose advice [the selecting official] relied on in deciding to promote [the male employee] instead of Kolstad, told sexually offensive jokes at the office and referred to professional women as 'bitches' and 'battleaxes.'" (Pet. App. 40a).

[10] "[T]he jury could also have reasonably found that ADA's claimed nondiscriminatory reasons for choosing Spangler over Kolstad—that Kolstad lacked recent legislative experience and strong writing skills—were after-the-fact rationalizations unworthy of belief." (Pet. App. 48a).

Circuit, but rather, with the court's findings concerning the existence of record evidence to support the jury's verdict and its application of this Court's decisions to those facts. Rule 10 of this Court emphasizes that "certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R.10. The ADA has not attempted to demonstrate and has totally failed to show why this is a "rare[ ]" case warranting departure by the Court from the strictures contained in its Rules governing exercise of its certiorari jurisdiction.[11]

2. THE ADA FAILED TO PRESERVE ANY *HICKS* ISSUE FOR APPELLATE REVIEW

Although the ADA expressly relied upon *Hicks* in its post-verdict motion for judgment as a matter of law ("JMOL"), that motion was fatally flawed because the ADA had failed to "specify" that it was relying upon *Hicks* (or the principles of *Hicks*) in the motion that it made at the close of the evidence as required by Rule 50, Fed.R.Civ.P. Rule 50(a)(2) of the Rules of Civil Procedure requires a party moving for judgment as a matter of law to specify the law and facts on which it relies:

> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. ***Such a motion shall specify*** the judgment sought and ***the law and the facts on which the moving party is entitled to the judgment***.

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[11] In its cross-petition, the ADA has neither shown nor attempted to show that, under the decisions of any other Court of Appeals, Kolstad's evidence would have been insufficient to establish liability. As Kolstad has shown in her Petition, the evidence she offered would have been sufficient to sustain a verdict for punitive damages in every Circuit which has established standards for punitive awards under Title VII, except the D.C. Circuit. (Pet. at 10-12, 13).

(Emphasis added). Rule 50(b) provides that if "the Court does not grant a motion for judgment as a matter of law made at the close of all the evidence," the "movant may ***renew its request*** for judgment as a matter of law by filing a motion no later than 10 days after the entry of judgment. . . ." (Emphasis added).

The district court record plainly shows that the ADA's post-verdict motion was not a "renew[al]" of the grounds specified in its pre-verdict motion. The ADA filed no papers in support of its pre-verdict motion, and the trial transcript makes clear that no mention whatsoever was made by ADA counsel of *Hicks* or the ADA's argument that Kolstad's evidence established "only" that the employer's proffered reasons for her rejection were false and, thus, was insufficient as a matter of law to support a finding of liability. The *complete* colloquy between the Court and counsel for the ADA at the close of the evidence was as follows:

THE COURT:	Now, Do you wish to make your motion?
MR. HARRISON:	Yes your Honor. I would move for judgment as a matter of law at this time.
THE COURT:	All right. The motion is denied.

(Oct.25, 1995 Tr. at 121, reprinted in the Appellate Appendix at J.A. 1109).

In the district court and in the Court of Appeals, Kolstad relied upon the decision of *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), for the proposition that the ADA had failed to preserve the *Hicks* issue for review. In *Whelan*, the D.C. Circuit quoted the Advisory Committee's Notes pertaining to

the 1991 amendments to Rule 50 and observed that a party cannot raise in a post-verdict JMOL arguments which had not been specified in a pre-verdict motion:

> Rule 50(a)(2) . . . requires the motion to "specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." Rule 50(b) states that when the judge either denies or does not initially grant such a motion, the case is deemed submitted to the jury subject to the judge's later determination of the legal issues raised in the motion. The motion "may be renewed" later under Rule 50(b). We have understood this to mean, and ***it seems indisputable, that '[t]he precise claim made in the motion for judgment n.o.v. must have been made in the motion for directed verdict.'*** *U.S. Indus., Inc. v. Blake Constr. Co.*, 671 F.2d 539, 548 (D.C. Cir. 1982); accord Fed.R.Civ.P. 50 advisory committee's note to 1991 Amendment (remarking that new language explicitly requiring specificity in Rule 50 motions works to "alter[ ] the result" in cases where a court, by allowing less specificity, effectively circumvented the requirement that the later motion be based on grounds raised in the earlier motion).

Id. at 1251.[12] The other courts of appeals have construed Rule 50 similarly. *See O'Connor v. Huard*, 117 F.3d 12, 17 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 691 (1998); *Cruz v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 34 F.3d 1148, 1154-1155 (2d Cir. 1994); *Kutner Buick, Inc. v. American Motors Corp.*, 868 F.2d 614, 617 (3d Cir. 1989); *Portage II v. Bryant Petroleum Corp.*, 899 F.2d 1514, 1523 (6th Cir. 1990). Thus, even if this case did present the "pretext only" issue (which it plainly does not), the ADA failed to preserve that issue for appellate review.

CONCLUSION

For all the foregoing reasons, the Court should deny the Conditional Cross-Petition for a Writ of Certiorari.

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[12] In *Whelan*, this defect was waived by the appellee. That did not occur here, as reflected by the record in the District Court and in the Court of Appeals:

Citing *Whelan*, Kolstad objected to the ADA's post-verdict motion in the district court. (Plaintiff's Opposition to the Motion for Judgment as a Matter of Law at 2 & n. 1, reprinted in the Appellate Appendix at J.A. 90). And, at oral argument, Kolstad's counsel expressly disavowed any waiver: "I don't think . . . they [the ADA] preserved their position . . . I don't need to get to the technicalities, although I am surely not waiving them . . . ***None of the grounds you see now were recited before the Court at the close of the evidence***. I make that point." (January 5, 1996 Transcript of Oral Argument at 16-17, reprinted in the Appellate Appendix at J.A. 128-29)(Emphasis added).

Kolstad also preserved her objection in the Court of Appeals, arguing in her Brief that the ADA was foreclosed from making a *Hicks* argument because of the requirements of Rule 50. (Kolstad's Brief in Nos. 96-7030/7047 dated Oct. 11, 1996 at 14-17).

Respectfully submitted,

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